85-1153

No. _____

Office-Supreme Court, U.S.
FILED
JAN 17 1986
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1985

JACK OTTO, Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALAN ELLIS, Member of the Bar
of the Supreme Court
and
DAVID M. McGLAUGHLIN
Counsel for petitioner

Ellis, Fogelnest & Newman, P.C.
1420 Walnut Street, Suite 315
Philadelphia, PA 19102
215-545-3773

QUESTIONS PRESENTED FOR REVIEW

I. Should this Honorable Court reinstate the Petitioner's original appeal, or in the alternative, remand for a new sentencing under the authority of its supervisory powers where:

A. The United States District Court never conducted any evidentiary hearing on petitioner's habeas corpus motion where a genuine question of fact existed, the resolution of which was crucial to the case?

B. The Honorable District Court failed to explain the full procedures for perfecting his direct appeal, the in forma pauperis procedures pursuant to F.R.Crim.P. 32(a)(2), failed to ascertain if the petitioner desired or needed court-appointed

counsel to represent him on direct appeal, and failed to advise the petitioner that without payment of the applicable fees on appeal, that said appeal was subject to dismissal ?

II. Is dismissal of the petitioner's direct appeal pursuant to Eleventh Circuit Rule 16(b) for failure to pay a filing fee a violation of the petitioner's fundamental due process rights and his fundamental right to a direct appeal in a criminal case where this was at best a failure to comply with a non-jurisdictional administrative requirement?

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I. This Honorable Court should reinstate the petitioner's original appeal, or in the alternative, remand for a new sentencing under the authority of its supervisory powers where:

A. The United States District Court never conducted any evidentiary hearing on petitioner's habeas corpus motion where a genuine question of fact existed, the resolution of which was crucial to the case. 7

B. The Honorable District Court failed to explain the full procedures for perfecting his direct appeal, the in forma pauperis procedures pursuant to F.R.Crim.P. 32(a)(2), failed to ascertain if the petitioner desired or needed court-appointed counsel to represent him on direct appeal, and failed to advise the petitioner that without payment of the applicable fees on appeal, that said appeal was subject to dismissal. 14

II. Dismissal of the petitioner's direct appeal pursuant to Eleventh Circuit Rule 16(b) for failure to pay a filing fee is a violation of the petitioner's fundamental due process rights and his fundamental right to a direct appeal in a criminal case where this was at best a failure to comply with a non-jurisdictional administrative requirement. 18

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Counsel has requested the certified record be sent to thiscourt pursuant to United States Supreme Court Rule 19.

TABLE OF CITATIONS AND AUTHORITIES

CASES

Bruce v. United States, 188 F.2d 467 (6th Cir. 1951) 19

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STATEMENT OF JURISDICTION

This petition for certiorari is filed pursuant to 28 U.S.C. §1254(1), and seeks review of a per curiam order of the United States Court of Appeals for the Eleventh Circuit entered on November 19, 1984, and which affirmed without opinion an order of the United States District Court for the Northern District of Georgia. Jurisdiction was obtained in the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. §2255, and jurisdiction in the United States Court of Appeals for the Eleventh Circuit was obtained pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

This case began with Mr. Otto's arrest on November 17, 1981, an ultimate conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1) in the United States District Court for the Northern District of Georgia. That conviction was on March 8, 1982, and was after a stipulated non-jury trial. (C.R. 105-107).[1]

On September 3, 1982,[2] Mr. Otto was sentenced to a term of imprisonment of

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[1]The letters C.R. refer to the actual certified record prepared and utilized in the United States District Court and the United States Court of Appeals for the Eleventh Circuit. Counsel has sent notice to the clerk of courts for the District Court of the need to certify this record to this court pursuant to Rule 19.

[2]Mr. Otto failed to appear for his initial sentencing.

fifteen years followed by a special mandatory parole term of three years. (C.R. 118). At sentencing, Mr. Otto was represented by counsel other than trial counsel, and yet another member of sentencing counsel's firm filed the initial notice of appeal in this case on September 10, 1982. That notice indicated, however, that counsel was not counsel for purposes of the appeal but that the appeal notice was filed only to preserve Mr. Otto's appellate rights. (C.R. 119). That initial appeal was docketed in the United States Court of Appeals for the Eleventh Circuit as No. 82-8591.

Then began a series of events revolving around Mr. Otto's failure to pay the appropriate filing fee for that appeal. Ultimately, that appeal was dismissed by the Clerk of the United States Court of Appeals for the Eleventh Circuit on February 17, 1983, for the failure to pay this filing fee. (C.R. 121).

Mr. Otto finally took steps to secure the return of his appellate rights by retaining private counsel and filing a motion for relief pursuant to 28 U.S.C. §2255 on October 20, 1983. The District Court, per the Honorable Richard Freeman issued a preliminary opinion and order on January 30, 1984, allowing Mr. Otto thirty days within which to comply with Rule 2 of the Rules Governing Section 2255 Motions. (C.R. 160-166. See also, Appendix, p. 33a). Said affidavit was prepared and filed timely, (Appendix, p. 28a), and in addition, Mr. Otto filed a motion for permission to engage in discovery, specifically, requests for admissions. The government filed a response to this affidavit and subsequent material on April 3, 1984, and disputed the essential facts contained in Mr. Otto's affidavit. Subsequently, the District Court filed an opinion and order on June 7, 1984, denying

the motion to engage in discovery, in addition to denying all relief on the motion pursuant to 28 U.S.C. §2255 without an evidentiary hearing. (Appendix, p. 24a). In that order, Judge Freeman held that the United States District Court was powerless to grant any relief to Mr. Otto since it appeared dismissal of his appeal was performed solely by the Clerk of the United States Court of Appeals for the Eleventh Circuit. The court opined that the exclusive remedy for Mr. Otto was to move for relief pursuant to F.R.A.P. 27 and local rule of the Eleventh Circuit 17(c)(13) and (d). This motion was prepared and filed in addition to a notice of appeal being filed on or about June 28, 1984. Said motion for reinstatement was opposed by the government, and then denied by the Honorable Robert S. Vance, of the United States Court of Appeals for the Eleventh Circuit. A brief on the merits

was filed in support of Mr. Otto's second appeal and on November 19, 1984, the United States Court of Appeals for the Eleventh Circuit affirmed per curiam without discussion or opinion. Mr. Otto now files the instant petition for certiorari as his last hope for relief.

ARGUMENT

I. A. The primary question in this case has centered on whether Mr. Otto received notices of the impending dismissal of his appeal dated November 24, 1982, December 12, 1982, and January 26, 1983, from the United States Court of Appeals for the Eleventh Circuit. Mr. Otto categorically denies receiving them, (C.F. 181), and the government has done its best to show circumstantially that he did. (C.R. 183-201).

But before discussing the law, two important things support Mr. Otto's position and must be set forth. First and foremost, it is pointed out that while the official record of this case contains a copy of the final notice confirming dismissal of Mr. Otto's initial appeal, C.R. 121, none of the previously referred to letters appear in that record. This is

highly significant since the document which directly precedes the dismissal notice of February 17, 1983, is the notice of appeal filed by previous counsel. Thus, even the certified record of this case does not contain the notices Mr. Otto claims he did not receive. In fact, he stated in his affidavit long before counsel even saw the official record that the only notice he ever received concerning this appeal was the one contained in the certified record of this case. Stated differently, there is no indication in the official record of this case that the letters of November 24, 1982, December 10, 1982, and January 26, 1983, were even sent by the Court of Appeals, let alone received by Mr. Otto.

The fact is plain that the staffs of the various courts of appeals in this country are not infallible. They do make mistakes, and indeed, it is only human to

do so. But as if to illustrate this point, this court's attention is directed to appendix 4a which is a copy of a form notice dated December 19, 1984, from the United States Court of Appeals for the Eleventh Circuit indicating that the enclosed judgment is relative to Mr. Otto's case. However, upon examination of the enclosed document, it is plainly seen that the enclosed document is in no way related to Mr. Otto's case. While this is by itself a seemingly insignificant point, it certainly highlights and supports the argument Mr. Otto has made that in spite of claims to the contrary, he did not receive the notices in question.

Second, this court cannot ignore the contents of Mr. Otto's affidavit of facts nor the efforts he has made to regain his

right to a direct appeal.[3]

In his affidavits of facts, a very cogent passage appears. That passage states:

> "I had absolutely no knowledge that my appeal rights were in jeopardy for the failure to pay a $70 filing fee. Had I known this fact, I would have paid said fee as soon as possible in order to prevent the dismissal of my appeal."

Have not Mr. Otto's actions since the dismissal of his original appeal supported this contention? Has he not made <u>every</u> effort to regain his lost appellate rights

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[3]The government has consistently made an issue over the approximate eight month hiatus between dismissal of his appeal and the filing of his 2255 motion. The government has raised the suggestion that this somehow evinces a waiver of his right to appeal. However, this delay was occasioned by Mr. Otto's financial inability to retain private counsel until some time prior to October, 1983. Naturally, he cannot be penalized for his failure to retain private counsel sooner and thus pursue his habeas corpus matter where, as a man confined to prison, his financial resources precluded it.

including the filing of a motion pursuant to local rule 17(c)(13) and (d) and F.R.A.P. 27?[4]

The ultimately conclusion all this leads to is that the District Court should have held an evidentiary hearing or at least permitted Mr. Otto's request for admissions. In that way the court could have more fully determined where the equities lie and fashion an order which does justice to the parties. Obviously,

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[4]As counsel pointed out in the memorandum accompanying the motion for reinstatement, such a motion was not pursued sooner because of the timeliness requirement. Obviously, as of October, 1983, a motion for reinstatement under that section and rule with respect to an appeal dismissed in February would have been untimely. And indeed, although the grounds for the refusal of this reinstatement motion were not given by Judge Vance, surely untimeliness must be among them. However, in view of the advisory language contained in Judge Freeman's final opinion, that procedure was pursued as expeditiously as possible.

justice to Mr. Otto would be either the direct reinstatement of his original appeal pursuant to this Honorable Court's supervisory powers, or the summary vacation of his judgment of sentence and the remanding for a new sentencing from which a timely and proper direct appeal may be taken and payment of the appropriate fees. While the lower court essentially felt it was powerless to do anything for Mr. Otto since the action of dismissal was performed by the Clerk of the United States Court of Appeals for the Eleventh Circuit, the case of Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), suggests otherwise. There, Justice Brennan did exactly what Mr. Otto seeks here in ordering a summary vacation of the defendant's judgment of sentence and the case remanded for a new sentencing thus paving the way for a second and properly filed direct appeal. Therefore, in this

case as well, the way was clear for utilization of that simple procedure which would have ultimately obviated the need to pursue this lengthy, and costly proceeding. This Honorable Court should now fashion the relief Mr. Otto seeks through the use of its supervisory powers.

B. In considering this argument, it is uncontroverted that at Mr. Otto's sentencing Judge Freeman did not explain the need to pay filing fees in order to perfect his appeal, and the in forma pauperis procedures pursuant to F.R.Crim.P. 32(a)(2). Nor did the court ascertain if Mr. Otto desired or needed court-appointed counsel to represent him on direct appeal. Finally, the court failed to advise Mr. Otto that without the payment of the applicable fees on appeal, that said appeal was subject to dismissal. In fact, the entire contents of the information given to Mr. Otto at sentencing is as follows:

> "THE COURT: All right, Mr. Otto, I'll sentence you to the custody of the Attorney General for a period of fifteen years, followed by a special three year mandatory parole term.
>
> Now since you were tried and found guilty of the offense of possession with the intent to distribute a quantity of cocaine hydrochloride, it is my duty to advise you that if you wish to

> appeal your convictin you must file your notice of appeal within ten days of the date that the judgment and commitment order is signed.
>
> That will probably be today, and out of an abundance of caution, I would advise you to file your notice of appeal today if you intend to file that. If you fail to file it within ten days you have waived your right to appeal ...
>
> THE COURT: And Mr. Otto, do you understand that you must do it within tendays of the date of the signing of that order which will probably be today?
>
> MR. OTTO: Yes sir.
>
> THE COURT: Mr. Brown has forms for you if you wish to get some from him, but in any event, it must be within ten days of the date of the entry of the judgment and commitment. All right."

Mr. Otto's argument is quite simply that where the court has failed to outline the procedures and options available regarding the in forma pauperis procedures, and the need to pay his filing fees in order to maintain that appeal, Mr. Otto

cannot be held accountable for failure to pursue them now. It was certainly obvious that as of the date of the sentencing, Mr. Otto was going to be confined in prison. Moreover, given the severity of his sentence, it was highly unlikely Mr. Otto would not appeal. Finally, Mr. Otto's entire strategy and tactics in the original criminal case are clearly and plainly geared to setting his suppression issues for appropriate appellate review. After all, it must be remembered that this was a stipulated non-jury trial and thus, Mr. Otto's expectation of acquittal was practically non-existent; especially after losing his issues at the suppression stage.

Case law supports Mr. Otto's claim in this regard as well. Cases have held essentially that where the court does not fully explain the in forma pauperis procedures as part of its duty under F.R.Crim.P. 32(a)(2), it can constitute

sufficient reason to reinstate the right of appeal once it has been lost. Duhart v. United States, 476 F.2d 597 (6th Cir. 1973), and Kirk v. United States, 447 F.2d 749 (7th Cir. 1971). This is especially true where a defendant has manifested the intent and desire to pursue a direct appeal and has made consistent efforts in that direction such as here. On this basis alone, Mr. Otto is entitled to the relief he seeks through the use of this Honorable Court's supervisory powers.

II. Finally, Mr. Otto attacks the constitutionality of local rule of appellate procedure for the Eleventh Circuit 16(b) both generally and as applied to his case. In essence, the use of that rule to dismiss his appeal has violated his fundamental rights to due process and his fundamental right to pursue a direct appeal in a criminal case. The theory is a simple one and begins by consideration of F.R.A.P. 1(b). That rule states:

> "Rules not to affect jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."

When a direct appeal is timely perfected, the jurisdiction of the appellate court is properly invoked pursuant to 28 U.S.C. §1291 and is complete. Conversely, when a timely perfected appeal of a defendant is dismissed pursuant to local rule 16(b) for the failure to pay a filing fee, that same

appellate jurisdiction is extinguished.

But since that right to a direct appeal in a criminal case has been elevated to practically the status of a fundamental constitutional right, Coppedge v. U.S., 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962), and since the failure to comply with a fee rule does not otherwise affect the jurisdiction of the court of appeals, Parissi v. Telechron, 349 U.S. 46, 75 S.Ct. 577, 99 L.Ed. 867 (1955), and represents at best a failure to comply with a technical requirement, the use of local rule 16(b) to extinguish that right and curtail the jurisdiction of the court of appeals is improper, illegal, and otherwise unconstitutional.

Moreover, the cases cited by the government as support for the opposite proposition are distinguishable on their facts. For instance, in Bruce v. United States, 188 F.2d 467 (6th Cir. 1951), it

was evident that the appellant manifested no interest in pursuing his appeal; certainly the opposite situation from that presented instantly. And in Thomas v. Computax Corp., 631 F.2d 139 (9th Cir. 1980), the appellant's non-compliance with a rule of court went to the merits of the case and did not involve a mere formality of non-payment of the filing fee. And even in Stewart v. Pearce, 275 F.2d 283 (6th Cir. 1960), which is the government's strongest case, the argument and challenge vis-a-vis the constitutionality of the dismissal rule, was not made or considered by the court of appeals. Thus, this case contains an argument the Stewart case did not. Although F.R.A.P. 3(a) does authorize the sanction of dismissal for failure to comply with the rules, it also indicates that the failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the

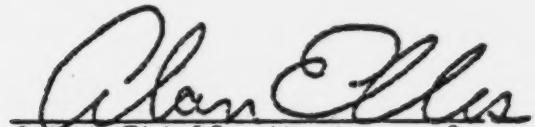
validity of the appeal. In addition, this court held 30 years ago in Parissi v. Telechron, supra, that the untimely payment of a filing fee did not vitiate the validity of an appeal.

Consequently, with due consideration of Rule 17 of the United States Supreme Court rules and in consideration of the court's inherent supervisory powers, this court should grant Mr. Otto's petition and provide him with the relief he seeks. In the alternative, this court should reach the constitutional question and hold that as applied to this case, Eleventh Circuit local rule of appellate procedure 16(b) is unconstitutional.

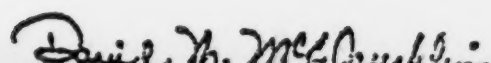
CONCLUSION

Wherefore, for the above-cited reasons and circumstances, the petitioner, Jack Otto, respectfully requests this Honorable Court grant his petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and summarily order his original appeal in that court indexed as No. 82-8591, reinstated. In the alternative, this Honorable Court should grant the petition for writ of certiorari, vacate the judgment of sentence and remand this case to the United States District Court for the Northern District of Georgia for re-sentencing.

Respectfully submitted,



ALAN ELLIS, Member of
the Bar
and



APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8529
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK OTTO

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

(November 19, 1984)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

United States Court of Appeals
Eleventh Circuit
Office of the Clerk
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Spencer D. Mercer
Clerk

In Replying, give number of case and names of parties

December 19, 1984

Ben H. Carter, Clerk
U. S. District Court
2211 U. S. Courthouse
75 Spring St.
Atlanta, GA 30335

No. 84-8529
USA v. OTTO
CR81-342A

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. See attached notice.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the

judgment of this Court in the above case issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.
(X) Original record on appeal or review. (4 vols.)
( ) Original exhibits.
( ) Bill of Costs approved by this Court.

Sincerely,

SPENCER D. MERCER,
CLERK

By: Phyllis R. Scott
Deputy Clerk

Encl.

cc: David M. McGlaughlin
Gary G. Grindler, AUSA

United States Court of Appeals
For The Eleventh Circuit

No. 84-8459
Non-Argument Calendar

D.C. Docket No. 83-697

GEORGIA FARM BUILDINGS, INC.,

Plaintiff-Appellant,

versus

VIVIAN WILLARD, INDIVIDUALLY
AND AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF CLAUDE HOWARD
WILLARD, DECEASED, AND JOHN L. GREEN,

Defendants-Appellees.

Appeal from the United States District
Court for the Norther District
of Georgia

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

J U D G M E M T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 29, 1984
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: Dec 18 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA : Old Appeal No.

v. : 82-8591

JACK C. OTTO : New Appeal No.

MOTION SUR REINSTATEMENT OF APPEAL

PURSUANT TO LOCAL RULE 17(c)(13)

AND (d) AND F.R.A.P. 27

TO THE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT:

The petitioner/appellant, Jack C. Otto, by his attorneys, ELLIS, FOGELNEST and NEWMAN, P.C., makes the following motion sur reinstatement of appeal pursuant to local rule 17(c)(13) and (d) and F.R.A.P. 27 and in support thereof avers the following:

1. Petitioner/appellant is Jack C. Otto.

2. Mr. Otto was convicted of possession of cocaine with intent to distribute, 28 U.S.C. §841(a)(1), on March 8, 1982, after a non-jury stipulated trial in front of the Honorable Richard C. Freeman of the United States District Court for the Northern District of Georgia.

3. On September 3, 1982, Mr. Otto was sentenced to a term of imprisonment of 15 years to be followed by a special mandatory parole term of 3 years.

4. A notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed in this matter, but the fees were never paid. The case was assigned no. 82-8591.

5. Said appeal was subsequently dismissed by the clerk for lack of payment of the appropriate fees by order dated February 17, 1983. A copy of this order is attached to this motion, marked Exhibit A, and incorporated herein by reference.

6. Thereafter, Mr. Otto retained present counsel who filed a motion for writ of habeas corpus pursuant to 28 U.S.C. §2255 on or about October 18, 1983, seeking restoration of his appeal rights, or at least a new sentencing from which a properly perfected appeal could be taken. A copy of this motion is attached to this motion, marked Exhibit B, and incorporated herein by reference.

7. On January 30, 1984, the District Court, per the Honorable Richard C. Freeman, ordered Mr. Otto to comply with the requirements of Section 2255 in that no affidavit of facts had been submitted by Mr. Otto. The court allowed 30 days from that date for the filing of said affidavit. A copy of this order is attached to this motion, marked Exhibit C, and incorporated herein by reference.

8. Said affidavit was prepared and timely filed. A copy of this affidavit is

attached to this motion, marked Exhibit D, and incorporated herein by reference.

9. In this affidavit, Mr. Otto denies receiving prior notices warning of the potential dismissal of his appeal, and avers that had he received said notices, he would have saved his appeal by paying all appropriate fees.

10. Mr. Otto also submitted a motion for permission to engage in discovery; specifically a request for admissions. A copy of this motion is attached to this motion, marked Exhibit E, and incorporated herein by reference.

11. The government filed a response to Mr. Otto's affidavit on or about April 3, 1984, and disputed the essential facts contained in Mr. Otto's affidavit. A copy of this response is attached to this motion, marked Exhibit F, and incorporated herein by reference.

12. Subsequently, the Honorable Richard C. Freeman filed an order dated June 7, 1984, denying the motion to engage in discovery, in addition to denying all relief on the motion pursuant to 28 U.S.C. §2255. A copy of this order is attached to this motion, marked Exhibit G, and incorporated herein by reference.

13. In that order, Judge Freeman held that the United States District Court was powerless to grant any relief to Mr. Otto since it appeared dismissal of his appeal was performed solely by the Clerk of the United States Court of Appeals for the Eleventh Circuit.

14. The District Court also held that the exclusive remedy for Mr. Otto was to move for relief pursuant to F.R.A.P. 27 and local rule of the Eleventh Circuit 17(c)(13) and (d).

15. Mr. Otto has filed an independent notice of appeal from the order of June 7, 1984.

16. Counsel has contacted the attorney for the government in this matter, and was advised that in view of their prior posture of opposing relief on Mr. Otto's motion pursuant to 28 U.S.C. §2255, they will oppose the instant motion.

17. The granting of the instant motion will not prejudice the government because all Mr. Otto seeks is the restoration of his right to direct appeal upon the payment of appropriate fees.

18. Granting the instant motion will represent a significant savings in time, money and judicial resources of not only Mr. Otto and the government, but this Honorable Court as well in that the need for a brief and consideration of the order denying habeas corpus relief will be eliminated.

19. The granting of the instant motion is required since the act of dismissal for non-payment of fees was improper, inappropriate, and illegal in that it violated Mr. Otto's Fifth Amendment right to due process of law, his fundamental right to a direct appeal in a criminal case, and was performed without any basis therefor in the law, statutory or otherwise.

20. The interests of justice require the granting of relief on the instant motion.

WHEREFORE, the appellant/petitioner, Jack C. Otto, respectfully requests this Honorable Court order his original appeal reinstated within 30 days upon payment of the appropriate fees.

Respectfully submitted,

_____

ALAN ELLIS
and

DAVID M. McGLAUGHLIN
Attorneys for
petitioner/appellant

COMMONWEALTH OF PENNSYLVANIA : SS.

COUNTY OF CENTRE :

I, DAVID M. McGLAUGHLIN, being duly sworn according to law, depose and say that I am the attorney for the within named petitioner/appellant; that I have read the foregoing Motion Sur Reinstatement of Appeal Pursuant to Local Rule 17(c)(13) and (d) and F.R.A.P. 27; and that the facts contained therein are true and correct to the best of my knowledge, information and belief.

DAVID M. McGLAUGHLIN

Sworn to and subscribed
before me this day
of July, 1984.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, : Old Appeal No.

v. : 82-8591

JACK C. OTTO : New Appeal No.

O R D E R

AND NOW, this day of , 1984, upon consideration of the Motion for Reinstatement of Appeal, it is hereby ORDERED that appeal no. 82-8591 be reinstated within thirty (30) days upon payment of the appropriate fees and costs.

BY THE COURT:

_____

J.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	Old Appeal No.
v.	:	82-8591
JACK C. OTTO	:	New Appeal No.

PROOF OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the Motion Sur Reinstatement of Appeal Pursuant to Local Rule 17(c)(13) and (d) and F.R.A.P. 27 upon the person and in the manner indicated below which service satisfies the requirements of this court, service by first class mail, postage prepaid, addressed as follows:

Gary G. Grindler, Esquire
Assistant U.S. Attorney
U.S. Attorney's Office
Suite 1800
Richard Russell Building
75 Spring Street, S.W.
Atlanta, GA 30335

ELLIS, FOGELNEST AND
NEWMAN, P.C.

By _____
DAVID M. McGLAUGHLIN
Attorney for
petitioner/appellant

Dated: July , 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA	:	Old Appeal No.
v.	:	82-8591
JACK C. OTTO	:	New Appeal No.
	:	84-8529

MEMORANDUM OF LAW SUR MOTION

FOR REINSTATEMENT OF APPEAL

In addition to the supporting documents supplied with Mr. Otto's motion, he also files this brief supporting memorandum.

Without getting into the merits of validity of the lower court's adverse decision on his motion for relief pursuant to 28 U.S.C. §2255, the District Court held that the procedures under local rule 17(c)(13) and (d) must be used since, in the District Court's view, this is the only procedure by which Mr. Otto may obtain relief.

While counsel was aware of local rule 17(c)(13) and (d), counsel felt the

timeliness requirements of that rule precluded the use of that procedure given the specific facts of Mr. Otto's case. After all, it was approximately nine months from the date the appeal was dismissed to the time Mr. Otto could afford to retain private counsel. Further, it was felt that if the court held an evidentiary hearing to resolve the factual dispute concerning Mr. Otto's non-receipt of the prior letters of the clerk warning of dismissal, and Mr. Otto was victorious at said evidentiary hearing, then under its habeas corpus power, the lower court could vacate the sentence imposed upon Mr. Otto, and resentence him whereupon Mr. Otto could then take a timely appeal which would be perfected properly, at least as to the payment of fees. In fact, this is the exact procedure suggested in the case of Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969).

But since the District Court's order left Mr. Otto with no remedy other than an appeal from that order denying relief, this motion is now filed in spite of the delay involved. In other words, with respect to reinstatement of Mr. Otto's appeal, this now represents the most expeditious and least complex method of restoring his direct appeal right.

In conclusion, Mr. Otto points out that in his affidavit he makes a most compelling and logical statement in that had he known his appeal was in jeopardy because of the non-payment of fees, he would have paid them and saved his appeal, not to mention the need to pursue collateral measures. Does not this claim make logical sense in view of the delay and frustration Mr. Otto has already encountered in his difficult pursuit of restoration of these direct appeal rights? Mr. Otto suggests that it does. Further, Mr. Otto raised the

serious question of the legality of extinguishing his direct appeal rights by a mere action of the clerk for failure to at most comply with a technical requirement.

All these factors weigh heavily in favor of Mr. Otto, and the granting of this motion. As has been pointed out all along, all he seeks is restoration of the right to pursue a direct appeal from his criminal conviction. In fact, the government's persistence and level of opposition is somewhat puzzling considering the limited form of relief Mr. Otto has sought all along.

Be that as it may, in conclusion, Mr. Otto again points out that the granting of this motion would represent a significant savings in time, money, and judicial resources since the need to pursue his second appeal would be mooted. Mr. Otto respectfully requests this Honorable Court consider this and the other factors

outlined above in determining whether to grant the instant motion.

Respectfully submitted,

ELLIS, FOGELNEST and
NEWMAN, P.C.

By _____
DAVID M. McGLAUGHLIN

and

_____
ALAN ELLIS
Attorneys for
petitioner/appellant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

U.S.A. Movant	)	Criminal No.
	)	81-342-A
vs.	)	C-83-2322-A
JACK OTTO Respondent	)	

J U D G M E N T

The court having denied/xxxxxxxxx the motion filed in the above case pursuant to 28 U.S.C. 2255, the same is hereby denied/xxxxxxxxx.

This the 11th day of June, 1984.

BEN. H. CARTER, CLERK

By _____
Deputy Clerk
Barbara C. Mathias

Filed and entered in
Clerk's Office this
6-11-84
BEN H. CARTER, CLERK

By _____
Deputy Clerk
Barbara C. Mathias

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :

vs. : CR81-342-A

JACK OTTO :

ORDER

This action is before the court on the motion of the defendant, Jack Otto, for relief under 28 U.S.C. § 2255 and on Otto's motion for leave to conduct discovery in regard to his section 2255 motion.

In an order dated January 30, 1984, this court allowed Otto time in which to submit an affidavit setting forth his statement of the facts upon which this motion is based. Concerned that Otto's affidavit might not reach this court within the time permitted, counsel for Otto obtained the government's consent to a ten-day extension of the time for filing the affidavit and filed a motion seeking such an extension. Because Otto's affidavit

was received by this court within the required time, the court will deny as moot the motion for an extension of time.

In his section 2255 motion, Otto seeks an order either (1) reinstating his appeal or (2) vacating his original sentence and resentencing him so that he will have another opportunity to perfect his appeal. Otto advances two grounds in support of this motion: first, that he was not advised at sentencing of his right to have appointed counsel and to proceed in forma pauperis on appeal and, second, that it was improper for the clerk of the Eleventh Circuit Court of Appeals to dismiss his appeal for lack of payment of filing fees.

Otto does not aver that he was unaware of his right to appointed counsel or that he could not afford retained counsel. Having asserted no facts showing that this court's failure to comply strictly with Rule 32(a)(2), Fed. R. Crim. P., was the

actual cause of his failure to perfect his appeal, Otto may not obtain resentencing on the first asserted ground. See Chapman v. United States, 469 F.2d 623, 637 (5th Cir. 1972).

Although it appears from the record that there exists a material factual dispute as to Otto's second asserted ground, the court concludes that it is not within the proper exercise of this court's power to determine the merits of this dispute. This court, in correcting its own errors, may permit a nunc pro tunc filing of a notice of appeal, see, e.g., Bowman v. United States, 483 F.2d 433, 434 (5th Cir. 1983), or may resentence a defendant, see, e.g., Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 1718 (1969). Otto's challenge to the dismissal of his appeal by the clerk of the court of appeals, however, calls into question the correctness of an action taken by the appeals court, and his

arguments on this issue should be directed to the Eleventh Circuit. See Eleventh Circuit Rule 17(c)(13) (motion to reinstate appeal dismissed by the clerk).

Accordingly, the defendant's motion under section 2255 is DENIED. Defendant's motion for leave to conduct discovery, which relates solely to the notices sent by the court of appeals clerk, is DENIED. Defendant's motion for an extension of time is DENIED as moot.

SO ORDERED, this 7th day of JUNE, 1984.

RICHARD C. FREEMAN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA :

V. : No. CR-81-342A

JACK OTTO :

AFFIDAVIT OF FACTS

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF : SS.

I, JACK C. OTTO, being duly sworn according to law, hereby swear and affirm under penalty of perjury the following facts:

I am the defendant in the above-captioned case. I was arrested in this jurisdiction charged with, tried and convicted of possession of cocaine with intent to distribute on March 8, 1982, after a non-jury stipulated trial in front of the Honorable Richard C. Freeman. I did not testify at trial. On September 3, 1982, I was sentenced to a term of imprison-

ment of 15 years to be followed by a special mandatory parole term of 3 years, and am presently incarcerated at the Federal Penitentiary at Lewisburg, Pennsylvania.

During the suppression portion of my trial and at the stipulated trial, I was represented by Daniel Preminger, Esquire, Philadelphia, Pennsylvania. I acknowledge that I failed to appear for an initial sentencing hearing at which time Mr. Preminger did appear. However, after my subsequent apprehension, Mr. Preminger informed me that he would not be able to continue representing me at the second sentencing and also informed me that they would deny any bail pending appeal.

Prior to the sentencing of September 3, 1982, friends of mine retained Mr. Robert Frier as my counsel to accompany me at sentencing. It was understood that because of the lower fee paid, Mr. Westby would be

filling in for Mr. Frier at the sentencing. However, it was indicated to me that for an additional $1,200 Mr. Frier would appear and represent me at sentencing. While the additional monies arrived that morning in order to secure Mr. Frier's presence at sentencing, they did not arrive in time and Mr. Westby represented me at sentencing at which time I received the sentence outlined above. Mr. Westby told me he had filed a notice of appeal on my behalf and told me that the appeal would cost between $10,000 and $15,000. I said that I could not afford that amount of money and mentioned a Rule 35 motion for sentence reduction possibility. He indicated he would file it and get back to me.

However, as of this date, and to my knowledge, I do not believe a Rule 35 motion was filed and the only communication I ever received from Mr. Frier was a letter

he sent to the courts notifying them that he was no longer my counsel. That letter is dated November 16, 1982.

At no other time did I receive any letters from the United States Court of Appeals for the Eleventh Circuit, my attorney, or anyone else indicating that my appeal was in jeopardy and in danger of being dismissed for failure to pay the filing fees. In other words, I specifically and categorically deny ever receiving letters dated November 24, 1982, December 10, 1982, and January 26, 1983. In fact, the only notice I ever received directly from the United States Court of Appeals for the Eleventh Circuit was a notice of February 17, 1983, indicating that my appeal had been dismissed for failure to pay the appropriate fees.

I had absolutely no knowledge that my appeal rights were in jeopardy for the failure to pay a $70 filing fee. Had I

known this fact, I would have paid said fee as soon as possible in order to prevent the dismissal of my appeal.

All I seek is the restoration of my appeal rights which were lost through absolutely no fault of my own.

I hereby swear and affirm under the penalty of perjury that the facts contained in the above affidavit are true and correct to the best of my knowledge, information and belief.

JACK C. OTTO

Sworn to and subscribed
before me this 24 day
of February, 1984.

Parole Officer-Authorized under
Act of July 7, 1955, to admini-
ster oaths (18 U.S.C. 40041)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	CR81-342A
	:	
vs.	:	
	:	
JACK OTTO	:	

O R D E R

This action is before the court on the motion of the defendant, Jack Otto, for relief under 28 U.S.C. § 2255.

Otto moves that this court either reinstate his initial appeal or vacate his original sentence and resentence him so that he will have another opportunity to perfect an appeal. Otto was sentenced by this court on September 3, 1982, after conviction at a non-jury trial for possession of cocaine with intent to distribute. Otto was represented at the sentencing hearing by retained counsel, Stephen Westby. During that hearing, the following discussion occurred concerning Otto's right to appeal:

> The Court: [I]t is my duty to advise you that if you wish to appeal your conviction you must file your notice of appeal within 10 days of the date that the judgment and commitment order is signed.
>
> That will probably be today, and out of an abudance of caution, I would advise you that you file your notice of appeal today if you intend to file that.
>
> If you fail to file it within ten days you have waived your right to appeal.
>
> Now Mr. Westby, do you understand that?
>
> Mr. Westby: Yes, Your Honor.
>
> The Court: And Mr. Otto, do you understand that you must do it within ten days of the date of the signing of that order, which will be probably today?
>
> Mr. Otto: Yes, Sir.
>
> The Court: Mr. Brown has forms for you if you wish to get some from him, but in any event, it must be within ten days of the date of the entry of the judgment and commitment.

Transcript of September 3, 1982, Hearing at 8-9. It is undisputed that the court did not inform Otto "of the right of a person who is unable to pay the cost of an appeal

to apply for leave to appeal in forma pauperis," as required by Rule 32(a)(2).

On September 10, 1982, R. G. Fierer, an attorney associated with Westby, filed a notice of appeal on behalf of Otto, stating in the notice that "[s]ignatory counsel in this case is not counsel of record for appeal, but submits this Notice of Appeal so as to fully preserve Jack Otto's right to appeal." No fees were paid at the time the notice was filed.

By letter dated November 15, 1982, the clerk for the Eleventh Circuit Court of Appeals informed Fierer that Otto's appeal would be dismissed unless docketing and filing fees were paid and a transcript ordered. In response, Fierer informed the clerk that he was not representing Otto, requested that the notice regarding dismissal be sent to Otto himself, and provided the clerk with an address for Otto at the United States Penitentiary in

Lewisburg, Pennsylvania. Notices regarding the necessity of paying the filing costs and of ordering the transcript were mailed to Otto at the Lewisburg address on November 24, 1982; December 10, 1982; and January 26, 1983. The Eleventh Circuit dismissed Otto's appeal on February 17, 1983, "for want of prosecution for failure of appellant to pay filing fees within the time fixed by the rules [of that court]."

In a letter dated April 1, 1983, Otto requested that the clerk of this court send him forms for filing a section 2255 motion and copies of many pleadings from his file. Otto requested that the clerk calculate the cost of copying these documents and stated that he would have "a Postal Money Order sent to cover the cost (please include shipping)." Government Memorandum in Opposition, Exh. I.

Otto filed the instant motion on October 20, 1983, for review by this

court. Before the court had considered the motion under Rule 4 of the Rules Governing § 2255 Proceedings to determine whether it should order the government to file an answer or other pleading, see Rule 4(b), the government filed a memorandum in opposition to Otto's motion.

Otto's principle argument is that this court erred at the sentencing hearing by failing to inform him of the right to proceed in forma pauperis; by failing to explain the full procedures necessary to perfecting his appeal, including the requirement that he pay fees; and by failing to ascertain whether Otto needed and desired court-appointed counsel to represent him on direct appeal. Otto has cited, and the court has found, no authority for the proposition that this court was required at sentencing to explain all of the steps necessary to filing and maintenance of an appeal. The court is

aware of no duty beyond what is required by Rule 32(a)(2), to inform a defendant of appeal procedures.

Although it is true that in the instant action the court failed to advise Otto of his right to proceed in forma pauperis, it is not clear from the record that the absence of such advice was the actual cause of Otto's failure to perfect his appeal. Such causation may not be presumed. Chapman v. United States, 469 F.2d 634, 637 (5thCir. 1972). Because Otto was represented at the sentencing hearing by retained counsel, it was not apparent at that time that Otto would not be represented on appeal or that he was primarily dependant upon the court for advice as to his rights. Id.

The government argues that Otto has waived his right to appeal, citing Otto's failure to respond to the letters sent to nim by the court of appeals clerk, one of

which clearly informed Otto of his right to proceed in forma pauperis with the assistance of court-appointed counsel. See Government Memorandum in Opposition, Exh. F. The government apparently contends as well that waiver may be found in Otto's failure to file the instant motion until more than six and one-half months after requesting the section 2255 forms from the clerk of this court. The government also notes that it is unclear from the record whether Otto was in fact unable to pay the necessary filing fees or whether at any time prior to the filing of this motion he desired to pursue an appeal.

The government requests that the motion be dismissed, but acknowledges that the decision in Chapman v. United States may require that the waiver question be resolved only after an evidentiary hearing. In a supplemental brief, Otto requests an evidentiary hearing, arguing

that questions of fact remain as to, among other things, what notices he received from the court of appeals, his relationship with prior counsel, what efforts he made to perfect his appeals, and his understanding of legal procedures.

The court agrees with Otto that it cannot determine the question of waiver from the record before it. It does not follow, however, that he is entitled to an evidentiary hearing. Rule 2 of the Rules Governing § 2255 Proceedings provides that a section 2255 motion

> shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petititioner.

(emphasis supplied). Although it is implicit in Otto's motion that he intends to show that the facts do not support a

finding of waiver, at no time has he set forth any statement of what evidence he would present at an evidentiary hearing. Nor has Otto himself sworn to the truth of any facts relating to the grounds he asserts; both the motion and the supplemental brief are signed only by Otto's present counsel.

Plainly, Otto has failed to make a sufficient showing of entitlement to an evidentiary hearing under the rules governing this proceeding. At the very least, Otto must first supply the court with a sworn statement of facts showing entitlement to the relief requested. Moreover, even if such a statement is submitted by Otto, it remains within this court's discretion to permit discovery under Rule 6 or to direct expansion of the record under Rule 7 in order to determine whether an evidentiary hearing is required.

In light of the above, the defendant is ALLOWED thirty (30) days from the date of entry of this order within which to amend his motion to comply with the requirements of Rule 2(b) of the Rules Governing § 2255 Proceedings, as set forth above. Failure to amend within such time shall result in dismissal of this motion. The government is PERMITTED thirty (30) days from receipt of such an amendment within which to file a supplemental response.

SO ORDERED, this 30 day of January, 1984.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

Rule 32 Sentence of Judgment

"(a) Sentence

* * *

(2) Notification of right to appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

Local Rule of the Eleventh Circuit 16

"16. Dismissal of Cases

* * *

(b) Dismissal for failure to prosecute. Where appellant fails to file the record or a brief or otherwise fails to comply with rules requiring processing an appeal (or other proceeding) to hearing, the clerk shall issue a notice to counsel, or to appellant if he appears pro se, that upon expiration of 15 days from the date thereof the appeal (or other proceeding) will be dismissed for want of prosecution if the default has not been remedied. If the default is remedied within the 15 days, the clerk shall not dismiss the appeal (or other proceeding) and if appellant is represented by counsel, the clerk may refer the matter to the court for possible disciplinary action against counsel."

Local Rule of the Eleventh Circuit 17

"17. Motions and Interlocutory Orders

* * *

(c) Motions for procedural orders acted upon by clerk. The clerk is authorized, subject to review by the court, to take appropriate action for the court on the following unopposed procedural motions timely filed and served (see F.R.A.P. 27(b)*):

* * *

(13) To reinstate appeals dismissed by the clerk."

*This motion was opposed by the government.